QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2012 SKQB 353**

Date: **2012 08 30**
Docket: CN J 44/2010
Judicial Centre: Regina

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JASON BRIAN EMIL WILL

Counsel:

Constance R. Hottinger and Dana J. Brule	for the Crown
Carson D. Demmans	for the accused

SENTENCING DECISION — BALL J.
August 30, 2012

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[1] Mr. Will, it is now my responsibility to determine an appropriate sentence in this case. You have been found guilty of manslaughter contrary to s. 236 of the *Criminal Code*, R.S.C. 1985, c. C-46. The offence is a serious one. It carries a maximum sentence of imprisonment for life.

[2] This is a tragic case for many people. It was tragic for Raime Myers. It was, and it continues to be, tragic for Raime's mother, Jessica, and for members of Jessica's family. The consequences have been especially life-altering for Raime's sister Sephroni.

I must consider those consequences in determining your sentence. Raime Myers is gone – creating, as family members stated yesterday, an emptiness that continues to affect them daily. At the outset, I will state the unhappy truth: any sentence I impose upon you today can never restore Raime to his family. From that perspective, no sentence will ever be enough.

[3] At the same time, I know that what occurred has been extremely traumatic for your family. I understand that they have stood by you throughout these incredibly difficult times.

[4] The purpose of principles of sentencing are set out in the *Criminal Code*. Section 718 states:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[5] Section 718.01 of the *Criminal Code* states:

> 718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[6] Section 718.1 of the *Criminal Code* states:

> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[7] And s. 718.2 of the *Criminal Code* states that a sentence should take into account "evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim".

[8] Raime Myers was only 18 months old when he died. By assuming the role of his parent, you placed yourself in a position of trust and authority in relation to him. I must treat the fact that you abused that trust and authority as an aggravating factor in sentencing.

[9] I must take into account the fact that you have never accepted any responsibility for your actions, or acknowledged that they significantly contributed to Raime's death. It is not that you have a diminished intellectual capacity – on the contrary, you demonstrate considerable fortitude and intelligence. Nor is it that your memory has been affected by alcohol or drugs. They have never been a problem for you.

[10] When I say that you have not acknowledged any responsibility for your role in causing the death of Raime Myers, I am not referring to the fact that you exercised your right to plead not guilty and to insist that the Crown satisfy its onus to prove your guilt beyond a reasonable doubt. After all, as Mr. Demmans stated yesterday, there were legal arguments to be presented on your behalf. What I am concerned about is that as recently as yesterday in this courtroom, when you had the opportunity to acknowledge your responsibility and to express some remorse, your focus was not on the pain and suffering experienced by Raime, Sephroni, Jessica, and the members of their extended family, but on how subsequent events have affected **you**, and how they have caused **you** to become depressed and unable to function. Until you accept your responsibility for what occurred, those who have stood by you throughout these difficult times may never accept that you are guilty of the offence with which you were charged. From their perspective, any sentence will be too much. But conversely, again as you heard yesterday during sentencing submissions, until you accept responsibility, members of Raime's family will never achieve closure. As I have already acknowledged, for them any sentence may not be enough.

[11] In *R. v. Cope* (1988), 59 Sask.R. 161, [1987] S.J. No. 357 (QL) (Sask.C.A.), Cameron J.A. observed that sentencing must be consistent with public confidence in the effective enforcement of the criminal law. This means, he said (at. p. 163):

> ... that the courts must be mindful of the importance of maintaining the confidence of those in the community, and they form by far the majority, who being conscientious, thoughtful, and even minded, appreciate the complexities involved in the imposition of sentence and look to the courts to find an appropriate balance among the several considerations that form the basis for these decisions.

[12] In *R. v. Oliver,* [1977] 5 W.W.R. 344, [1977] B.C.J. No. 932 (QL) (B.C.C.A.), Farris, C.J.B.C. put it this way (at p. 346):

> Courts do not impose sentences in response to public clamour, nor in a spirit of revenge. On the other hand, justice is not administered in a vacuum. Sentences imposed by courts for criminal conduct by and large must have support of concerned and thinking citizens. If they do not have such support, the system will fail.

[13] In addition to the tragic consequences and your absence of remorse, there are certain factual circumstances that must be taken into account. This was not simply a case of inadvertent suffocation. The hypoxic brain injury sustained by Raime caused by the deprivation of oxygen to his brain was accompanied by multiple bruising, for which you were also responsible. That said, on the evidence as presented, I find that your abusive conduct towards Raime was an unpremeditated, one time event. That is, the abuse that lead to his death did not take place over a sustained period of time as measured in days or weeks. I accept that you did not intend to cause his death. (If the Crown had believed otherwise you would have been charged with murder and you were not). Furthermore, whether you should have or not foreseen it, I accept that you did not foresee his death.

[14] There are other circumstances that tend to distinguish this case from some of the cases cited and relied upon by the Crown, such as *R. v. Bighead (G.),* 2003 SKCA 44, 232 Sask.R. 236 and *R. v. Whitehawk* 2010 SKCA 94, 359 Sask.R. 105. What happened did not involve alcohol or drugs. You have no previous criminal record for related offences. You do not have a history of engaging in violence against others.

[15] In *R. v. Lam*, 2004 ABQB 78, 351 A.R. 335, Macklin J. stated at para. 9:

> 9 I have been provided with many case authorities involving the death of an infant and the conviction of an individual for either manslaughter or criminal negligence causing death. While it is difficult to distinguish between cases of manslaughter by criminal negligence (s. 222(5)(b)) and cases of criminal negligence causing death (s. 220), there is a distinction to be drawn between cases of unlawful act manslaughter (s. 222(5)(a)) and either criminal negligence manslaughter or criminal negligence causing death. The two constants in all of the cases are first, conduct resulting in the death of an infant and second, fault short of intention to kill. In the cases of criminal negligence manslaughter and criminal negligence causing death, the second component can be further defined as an act of wanton or reckless disregard for the life or safety of another or a marked departure from what one would expect of a reasonable person in the circumstances.

[16] In my view, your conduct amounted to a wanton or reckless disregard for Raime's safety and a marked departure from what one would expect from a reasonable person in the circumstances. That is the basis on which I assess your moral culpability.

[17] Your counsel, Mr. Demmans, submits that an appropriate sentence would be incarceration for as little as four and no more than six years. Ms. Hottinger, for the Crown, submits that the period of incarceration should be more than seven years and appropriately nine or ten. Ms. Hottinger acknowledges that a sentence of that duration would be longer than sentences ordinarily imposed in cases of manslaughter by criminal negligence (s.222(5)(b) of the *Code*). Her argument that this would be appropriate is based on four propositions.

[18] First she asserts that the conviction in this case was for manslaughter by means of an unlawful act (s.222(5)(a) of the *Code*). Second, she asserts that the court must impose a higher penalty than if the conviction had been for manslaughter by

criminal negligence (s.225(5)(b) of the *Code*.) Third, she submits that the starting point in sentencing for manslaughter by wrongful act is imprisonment for seven years. And fourth, she asserts that the sentence can only go up from seven years where the case involves the death of a child and the accused has not demonstrated remorse.

[19] I have some difficulty with those positions. First, the Indictment filed by the Crown in this case did not state that you were charged with manslaughter by means of an unlawful act (s. 225(a) of the *Code*) as distinct from manslaughter by criminal negligence (s.222(5)(b) of the *Code*). At no time prior to trial did the Crown take the initiative to provide particulars on the point. Second, for sentencing purposes the Crown makes no attempt to provide a rationale for differentiating between the two in either law or fact. In my view, it is a distinction that is of little practical value in achieving consistency in sentencing similar offenders for similar offences in similar circumstances.

[20] Third, even if it could be said that a seven year term of incarceration would be a reasonable starting point in this case, the argument that it can only be increased converts it from a starting point in the range to a base, or floor. And fourth, while it is correct to assert that where an offence results in the death of a child deterrence and denunciation must be paramount considerations in sentencing, it is incorrect to assert that this can and should lead to a sentence that is inconsistent with the requirement of consistency in sentencing.

[21] Preserving the integrity of the administration of justice entails upholding the public's confidence in the effective enforcement of the criminal law, imposing proportionate sentences, and achieving equity, in the sense of avoiding disparity. As

Cameron J.A. stated in *R. v. McGinn* (1988), 75 Sask.R. 161, 49 C.C.C. (3d) 137 (Sask.C.A.), at p. 142-143:

> 11 As for equity in sentencing we have to be careful to avoid disparity, that is, warrantless or irrational variations in sentences for the same or a similar crime committed in the same or similar circumstances. This has prompted the courts to work their way, over time, and wherever reasonably possible, toward ranges of sentences for this offence or that; and then to sentence within those ranges, moving up or down the range as the presence of aggravating or mitigating circumstances suggests. This does not mean, of course, that sentences must invariably fall within the range, when one exists. From time to time extraordinary circumstances present themselves, justifying departure at either the low or the high end of the range. And so rational variations both within and without the range are not only permissible, according to the variation in circumstance, they are necessary to achieve justice. But remaining within the range in the absence of the extraordinary is equally necessary to attaining justice, for otherwise disparity sets in.

[22] The various authorities cited to me by both counsel establish that a conviction for manslaughter arising from the death of a child will result in a substantial custodial term within a range of as low as 4 and as high as 10 to 12 years. That is so whether the conviction is for manslaughter by criminal negligence or manslaughter by an unlawful act. It is equally clear that the overriding principles to be applied in a case involving the death of a child caused by a person in a position of trust or authority are those of deterrence and denunciation. While there will always be factual differences, I note that the sentences imposed by the Court of Appeal in the case of *Bighead, supra,* was six and one-half years, in the case of *Shorting*, 2009 SKCA 102, 337 Sask.R. 134, six years and in the case of *McConnell*, 2012 ABQB 369, [2012] A.J. No. 574 (QL), six years.

CONCLUSION

[23] Having considered the circumstances of this offence, the submissions of counsel, and the applicable sentencing principles, it is my view that the appropriate sentence to be imposed upon you on the charge of manslaughter is seven years in a federal penitentiary.

[24] Pursuant to s. 109 of the *Criminal Code*, I make an order prohibiting you from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance for life. You shall have 30 days in which to lawfully dispose of any of the above items and to surrender every authorization license and registration certificate currently held by you relating to anything, the possession of which is now prohibited. If you fail to lawfully dispose of the above items, they shall be forfeited to Her Majesty the Queen and may be disposed of as the Attorney General directs.

[25] I also make an order in Form 5.04 pursuant to s. 487.052(1) of the *Code* authorizing the taking, from you, for the purposes of forensic DNA analysis, of any number of samples of one or more bodily substances reasonably required for that purpose by means of the investigative procedures described in subsection 487.06(1).

D Ball J.

D.P. BALL